

# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

.....X

UNITED STATES OF AMERICA

**11-CR-213**

**-against- :**

United States Courthouse  
Central Islip, New York

**LEONARD STAMBLER,**

September 26, 2013

**Defendant. :**

.....X

**TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE**

## APPEARANCES:

For the Government: LORETTA E. LYNCH  
United States Attorney  
100 Federal Plaza  
Central Islip, New York 11722  
BY: ALLEN BODE  
Assistant United States Attorney

**For the Defendant:                    GARY SCHOER, ESQ.**

**Court Reporter:** Perry Auerbach  
100 Federal Plaza  
Central Islip, New York 11722  
(631) 712-6103

Proceedings recorded by mechanical stenography.  
Transcript produced by computer.

1 THE CLERK: Calling 11-CR-812, United States of  
2 America versus Leonard Stambler.

3 Please state your appearances for the record.

4 MR. BODE: Allen Bode for the government. Good  
5 afternoon, your Honor.

6 THE COURT: Good afternoon.

7 MR. SCHOER: Good afternoon, your Honor. For  
8 the defendant, Gary Schoer.

9 THE COURT: Good afternoon. The defendant is  
10 present as well. You can be seated.

11 The conference was scheduled to deal with the  
12 motions -- the in limine motions that have been filed. So  
13 I wanted to discuss those, give you a chance to add  
14 anything you'd like to add to your papers, and rule on  
15 some of them. Although I don't think -- you can talk a  
16 little bit about the character evidence, but I think  
17 that's one of those things that we're going to have to  
18 sort of wait until I have a better feel for who the  
19 witnesses would be. But I appreciate, obviously, the  
20 briefing of the issues so that I can think about it in  
21 advance.

22 Why don't we just go issue by issue, I'll give  
23 you a chance to add anything that you want to add to your  
24 papers and then I'll state my ruling for the ones that I'm  
25 going to rule on.

1           The first one was the government's motion to  
2 admit evidence of the defendant's marijuana transaction  
3 with Chris Adams. Is there anything that you want to add  
4 to your papers on that, Mr. Bode.

5           MR. BODE: Just one thing, your Honor, in terms  
6 of in looking at Mr. Schoer's response. I didn't write a  
7 reply, but the one thing that I would note is it seems  
8 clear that the defense here is -- and Mr. Schoer and I  
9 have talked and we get along great with one another, it  
10 seems like the defense is going with that this was a  
11 lawful medical treatment, the usual course and practice.

12           What this evidence of this marijuana  
13 distribution buy Chris Adams to defendant Stambler shows  
14 is that as early as November of 2010, defendant Stambler  
15 knew that Chris Adams was distributing false substances;  
16 marijuana. He was on notice to that.

17           Frankly, my expert witness will testify that if  
18 you know that your witness -- that your person is  
19 distributing controlled substances, you should take other  
20 precautions which he didn't do.

21           I also note that although Mr. Schoer talks about  
22 the stigma, I submit that stigma as to marijuana use in  
23 society today is nearly nil. This is a violation, not a  
24 crime. And the stigma, as conspired to oxycodone is  
25 drastically less.

1           So that is what I would argue, your Honor, in  
2 terms of why it's important to the relationship beyond  
3 what I stated in my papers and in terms of the stigma.

4           THE COURT: It wasn't clear to me at what point  
5 in the relationship this occurred. This says late 2010,  
6 but I don't know when the relationship started.

7           MR. BODE: I think in July 24th of 2010 or  
8 thereabouts, the defendant Stambler started prescribing  
9 oxycodone to Chris Adams. So it was in July. In like  
10 November, Chris Adams gets in an auto accident, the  
11 prescription continue. And then December approximately is  
12 when the marijuana occurred. So it's about five months  
13 into their relationship.

14          THE COURT: Okay. Do you want to respond to  
15 that, Mr. Schoer?

16          MR. SCHOER: Judge, I would just say that  
17 your Honor has the letter that I submitted. But just in  
18 response to what Mr. Bode said, it seems to me he's  
19 arguing that there is no stigma, but he wants to use it to  
20 show distribution of controlled substances which would  
21 clearly be the stigma. And so it's our position that, as  
22 I've argued, that any probative value of this marijuana,  
23 again, would be outweighed by the prejudice or potential  
24 prejudice.

25          THE COURT: Okay. After considering the

1 arguments, I am going to preclude this piece of evidence  
2 under 403 for the following reasons.

3 Just to make clear what the evidence is, it's  
4 one transaction in late 2010 regarding a small quantity of  
5 marijuana that was allegedly provided by the witness to  
6 Mr. Stambler.

7 The government accurately cites the law, which  
8 is that other criminal acts can be used to explain how a  
9 criminal relationship developed to provide background  
10 information to help the jury understand the basis for the  
11 co-conspirator's relationship of mutual trust.

12 The government cites a case United States versus  
13 Williams, 453 Fed FTPS 74 Second Circuit 2011, which  
14 recites what is well-settled Second Circuit authority.

15 However, when applying that standard to this  
16 particular piece of evidence and the reason that the  
17 government is offering it in this case, I find the  
18 probative value to be low for a couple of reasons.

19 First, it's alleged to be one transaction on one  
20 date involving a personal use level of marijuana. So I  
21 don't think it's highly probative and a major event in  
22 relationship between the two or a development of trust  
23 between the two. I distinguish this from, for example, in  
24 Williams, although it dealt with marijuana, it dealt with  
25 a relationship of guns and large quantities of marijuana.

1 So this is not -- that is not case where it involved one  
2 transaction of huge quantities of marijuana.

3 I think lack of probative value is highlighted  
4 by the fact that, as Mr. Schoer points out, there is other  
5 evidence that the government has available to it to  
6 establish the background relationship, how the trust  
7 developed. And as I just tried to determine, that wasn't  
8 like the beginning of the relationship between the two.

9 So I think in light of those facts, it has low  
10 probative value. I do recognize the fact that the  
11 government's other evidence establishes the background to  
12 the relationship and the trust that developed independent  
13 of this alleged transaction and I understand there's some  
14 significance when a relationship crosses into criminal  
15 conduct and that has some added probative value. But I  
16 just don't believe it is high under these circumstances  
17 for the reasons that I've indicated.

18 And in contrast to that, whatever probative  
19 value it does have, I do believe that it is substantially  
20 outweighed by the danger of unfair prejudice under 403 for  
21 the following reason. I think, although Mr. Bode is  
22 correct in terms of that it is simply a violation and  
23 there's not a kind of stigma attached to this type of  
24 criminal activity that there would be other situations,  
25 the Court has to take into account what the nature of this

1 case is.

2 This is not a murder case where a cooperator is  
3 going to say before he committed the murder we smoked  
4 marijuana together. In that type of situation I think the  
5 government would have a very strong argument that it's not  
6 going to have a -- that the jury is not going to convict  
7 someone of murder simply because they -- even if the  
8 believed they smoked marijuana with a cooperating witness,  
9 they're not going to make that unfair prejudicial  
10 conclusion.

11 Here, you have a doctor who's charged with  
12 providing prescription drugs without legitimate purpose.  
13 So I believe that there's a heightened danger of unfair  
14 prejudice when you introduce drug use or possession by  
15 that doctor, illegal drug use and possession, that you run  
16 the risk that a jury may say, well, he's a doctor, he's  
17 willing to receive marijuana illegally, he's going to be  
18 more than willing to do other things illegally such as  
19 prescribe medication when he's not to.

20 So you do run the risk because it is a case  
21 involving a doctor and his practices with respect to  
22 prescribing medication, that it will unfairly prejudice  
23 him even though in and of itself it is not a major  
24 criminal offense.

25 So for those reasons I believe under 403, any



1 probative value has in terms of the relationship is  
2 outweighed by the danger of unfair prejudice.

3 I will reserve on one issue. I don't think I'll  
4 change my mind at all on this, but to the extent Mr. Bode  
5 erases something I hadn't thought about before coming out  
6 here which is it has some probative value because it shows  
7 that he was aware that the person he was prescribing drugs  
8 to was distributing marijuana, and how it's impacted his  
9 prescribing OxyContin. Is that basically what you're  
10 arguing?

11 MR. BODE: Exactly. That they would need to  
12 take precautions.

13 THE COURT: I'll reserve on that. I don't want  
14 the witness to go into that until I have a chance to think  
15 about it more and consider it. I think my ruling would be  
16 the same under 403. There could potentially be -- that  
17 would be the same, it would have a way of having him  
18 explain out loud, explaining how he knew that.

19 MR. BODE: The defense could stipulate,  
20 your Honor, that Mr. Stambler knew about that marijuana  
21 distribution.

22 THE COURT: I don't know if they'd stipulate to  
23 that. I'm thinking out loud here. There could be a  
24 scenario where if I allowed you to elicit from the  
25 cooperator that was Dr. Stambler aware that you had

1 marijuana and would give it to other people, or something  
2 like that, without making it clear that it was the  
3 defendant. And obviously if Mr. Schoer wanted to  
4 challenge him on that, it would open the door to explain  
5 how he knows how the defendant knew that. So then it  
6 wouldn't have the unfair prejudice in terms of the jury  
7 knowing that he was providing to the defendant, but it  
8 would still come out that the defendant was aware of it.  
9 I have to think about it.

10 MR. BODE: I'm not going to open on it and I  
11 Chris Adams won't be the first witness.

12 Alternatively, if your Honor, isn't going to --  
13 I would ask that I be allowed to ask if Dr. Stambler was  
14 aware that he had the marijuana distribution and leave it  
15 at that.

16                   Alternatively, if your Honor were to decide we  
17                   couldn't do that, although I don't see how it stigmatizes  
18                   him at all, alternatively then I would ask that the  
19                   defense be precluded from talking about marijuana at all.

20 THE COURT: You mean from an impeachment  
21 standpoint?

22 MR. BODE: Yes. We can think about it.

23 THE COURT: Let me think about it.

24 In the context of their relationship, did the  
25 issue of marijuana get discussed, other than the context



1 MR. SCHOER: I do. I think that was always my  
2 intent. I think this came up because I provided as a main  
3 exhibit, a document from the Attorney General's office  
4 State of New York which talks about the problems with the  
5 old system and what they were proposing with respect to  
6 the new system.

7 But while I gave it to Mr. Bode in an abundance  
8 of caution, I don't think I'm going to introduce it. I  
9 will -- if in my head I'm rethinking, it's probably going  
10 to be used on cross-examination to just raise issues with  
11 respect to the problems with the prior system.

12 THE COURT: The same issue would apply on  
13 cross-examination with whatever witness you have up there.  
14 It would be completely fair game to say wasn't there a  
15 problem with this, the system couldn't do this. But then  
16 to ask the next questions, well, like now, don't they have  
17 this and that.

18 MR. SCHOER: I understand, your Honor's ruling.  
19 And I'm not disagreeing. I think that I can do it, it was  
20 what I intended to do.

21 THE COURT: Okay. And then on the character  
22 evidence, again, I think if you want to have a discussion  
23 about that, we can discuss it now, but I don't think that  
24 I'm going to make any rulings.

25 I am just going to provide some general guidance

1 so that you can think about, which is I think -- and I  
2 don't know if you're intending to call certain patients or  
3 how you intend to put on this character evidence, but I  
4 think in terms of the character traits that you start  
5 talking about in your letter, Mr. Schoer, in terms of the  
6 ones that are pertinent, I think that traits related to  
7 the things like directions that the medications be  
8 prescribed properly, his concern that they not divert or  
9 abuse medications, I think those types of character traits  
10 would be relevant, those are, I think, relevant to what  
11 the charges are here.

12 I would have some concern if you start bringing  
13 in patients that have nothing do with OxyContin or similar  
14 prescription drugs and his interactions with them on that,  
15 which is something for ailments for them to say he's a  
16 good doctor to me. I don't know what character traits  
17 those would provide to the jury.

18 And there's obviously 430 concerns in terms of  
19 sympathy, once you start wanting patients to come in to  
20 say he saved my life or he's a good doctor. That's the  
21 type of thing that I have on this issue, but we can  
22 discuss it further.

23 MR. BODE: I'm not asking your Honor to rule now  
24 either. I just wanted to raise an issue, in terms of  
25 Mr. Schoer's reply, I'll say, that he was going to be

1 opening on specific instances with other patients, I think  
2 is clearly not character evidence and at least as we -- in  
3 reply, Mr. Schoer cited 406. But in looking for the  
4 reasons in 406, this doesn't appear to be anything that  
5 would fall under 406.

6 So we don't need a ruling now, I wanted to bring  
7 it up specifically because I didn't know what he would be  
8 arguing.

9 THE COURT: Again, I have to think about it. I  
10 didn't get a chance to look at the cases on this issue and  
11 these types of traits obviously don't come up within a  
12 normal trial, the doctor-related traits. So I'd have to  
13 give it more thought.

14 I assume you're not going to open on character  
15 witnesses, are you?

16 MR. SCHOER: No, I don't intend to open on  
17 character witnesses. The concept, perhaps. But not a  
18 particular witness that's going to testify.

19 MR. BODE: That's fine. That's fine.

20 THE COURT: Okay. Then the last issue that I  
21 have in terms of the in limine motions was the defense's  
22 -- the motion by the government to preclude the defense  
23 from offering the August 19th and September 20th  
24 recordings between the defendant and the informant and  
25 undercover. So I'll give you a chance to add anything

1 that you want to add on that. Mr. Bode.

2 MR. BODE: Your Honor, I did a -- the motion and  
3 I even did the reply to the defendant's response, so I'll  
4 just rest on that. I've already had my chance to reply to  
5 Mr. Schoer's response. I'll leave it at that.

6 THE COURT: Okay.

MR. BODE: The government believes, you know, in essence it's proving something that's not an issue. Just so the record is very clear, I think I made this clear in my letter, we specifically identify five patients about which we were going speak. Three of them were engaged in criminal activity. Christopher Adams, his girlfriend, Nancy Cook and Anthony Rinaldi. And then two other patients that were relevant, not because they were engaged in criminal activity, but because defendant Stambler discussed the fact that he was interested in these two women romantically and he was prescribing them oxycodone. So, obviously those relationships would be outside the usual course of medical practice.

20 So those are the only five patients we've  
21 indicated that we are going to be discussing in terms of  
22 the -- based on all that, we believe that the risk of  
23 confusion to the jury is great and the -- as I point out  
24 in my reply, the exceptions that the defense cites clearly  
25 seem applicable to the present sense impression for the

1 phone call.

2 THE COURT: I think many of the proposed grounds  
3 by Mr. Schoer created were not strong, but the one that  
4 I'm focused on that I do believe is strong is the state of  
5 mind, the intent of the defendant. Obviously that's a  
6 central issue in this case, especially when you're dealing  
7 with prescription drugs and the government's theory is  
8 that he was involved in that conspiracy where his intent  
9 was to distribute OxyContin without any legitimate medical  
10 purpose, and that was his intent with respect to these  
11 individuals that you're putting on the stand.

12 So I don't know why, if they have these  
13 recordings in which he's not doing that, he's showing some  
14 intent to try to determine whether or not these particular  
15 individuals really need the OxyContin, why that's not  
16 relevant as to his state of mind during the time period of  
17 the alleged conspiracy.

18 I don't understand why you think that doesn't  
19 have any probative value. That probative value of intent  
20 is only limited to the patients that you select.

21 MR. BODE: It is, your Honor, because that's the  
22 crime. Saying -- we're not alleging that everything he  
23 did as a doctor was criminal. What he did as to these  
24 patients was criminal. The fact that with some other  
25 patient he didn't commit a crime is interesting, but as



1 the example I've put forth, I think the best analogies in  
2 a bank robbery, he robs bank A on date X saying, well, on  
3 date Y he didn't rob bank B, I submit is not probative of  
4 when he robbed bank A.

5 We're alleging the criminal activity --

6 THE COURT: But that hypothetical is kind of not  
7 completely analogous. It's not just putting on proof that  
8 he didn't rob a bank on another day. If you want to use  
9 the bank analogy, it would be that you allege a conspiracy  
10 to rob banks and the government is alleging he robbed a  
11 bank on Sunday, but the informant came in on Monday and it  
12 was recorded the day after the robbery where the informant  
13 says, hey, we're going to rob a bank tomorrow and the  
14 recording -- on the recording the defendant says, what are  
15 you talking about, I don't rob banks, I would never rob  
16 banks, that's something I would not do.

17 That would be analogous to what we have here, at  
18 least according to their proof. It's a little more  
19 complicated than a bank robbery, because it deals with a  
20 doctor's procedures for evaluating legitimate medical  
21 uses. It's a very complicated question that has to be  
22 addressed.

23 So I don't know that the bank robbery analogy is  
24 perfect. How else is he supposed to prove his intent, if  
25 you're suggesting he's only limited to proof as to these

1 patients and he can't try to show what the intent or state  
2 of mind was with respect to prescribing OxyContin during  
3 that time period other than the witnesses we select. It  
4 seems a pretty narrow view of the state of mind.

5 MR. BODE: It's the crime, your Honor. It's --  
6 for example, if you want to make it a drug sale analogy,  
7 if we want to take it back to the street corner drug sale;  
8 on this day, the defendant took prerecorded buy money and  
9 did a drug transaction or is the defendant then -- can  
10 they introduce that on some other day the defendant went  
11 to church, he didn't sell drugs that day, or on some other  
12 day.

13 You know, in this case they're patients and  
14 where does it stop? Are we going to hear evidence for  
15 every other patient? He's seeing 80 patients a month, are  
16 we going to hear 75 other stories as to what he did with  
17 these other patients?

18 There's a reason why the hearsay rules work in  
19 one direction, and that's so the defendants can't create a  
20 self-serving hearsay to protect themselves.

21 In this case, we're going to show at trial that  
22 he knew that he was being investigated. So we believe  
23 that these were self-serving statements that he knows --  
24 he knows he's under investigation and he's on to the  
25 undercover. So that's why we believe, and that's why the

1 hearsay rules are the way they are.

2 I submit that in the bank robbery example, that  
3 that self-serving statement would likewise, you know,  
4 after the robbery, the self-serving statement, I don't rob  
5 banks, would be similarly inadmissible, your Honor,  
6 because of the hearsay rule.

7 This isn't a case where he's seeing a certain  
8 type of patient, a singular type of patient. Let's say  
9 he's only seeing cancer patients and he treats them all in  
10 the same way. He's seeing anybody and everybody, he has a  
11 phone call, he has no office, he comes to you. That's why  
12 we believe that this is inadmissible.

13 THE COURT: Okay. Mr. Schoer.

14 MR. SCHOER: Judge, there's not a lot I have to  
15 add except that I think the time line, the last argument  
16 that Mr. Bode made in that is that he knew that he was  
17 under investigation. The videotape of the confidential  
18 informant was not the first time that Dr. Stambler had  
19 treated that patient and he continued to treat him after  
20 the videotape. And so there's no evidence that he knew  
21 that that person was a confidential informant.

22 And in addition, there's no evidence that he had  
23 any idea that the undercover police officer who was  
24 introduced to him by that confidential informant, when she  
25 called, was a police officer or that he was even under

1 investigation at that time in September.

2 I submit that your Honor is correct; this goes  
3 clearly to his state of mind and his intent to distribute,  
4 the dispense of outside medical judgment.

5 THE COURT: I do have some concern of -- I  
6 think, as you can tell from my question to Mr. Bode, I  
7 understand the theory of state of mind, because I don't  
8 think the other theories that you have are winners.

9 But Mr. Bode is correct, if that theory, though  
10 then theoretically you can start marching in any patient  
11 who is under treatment with OxyContin and try to argue  
12 that the jury should be able to hear all the other people  
13 that he treated without over-prescribing or he examined  
14 legitimately and that does concern me. I don't think that  
15 that's appropriate.

16 MR. SCHOER: I don't intend to do that, Judge.  
17 My intent is to introduce these -- this video and this  
18 audio that were, that are part of the government's  
19 investigation, and not go further than that.

20 THE COURT: And just explain, I got a little bit  
21 of the flavor from your letter and Mr. Bode's letter, the  
22 first one, the informant asks him to have something  
23 prescribed and he examines him for 45 minutes.

24 MR. SCHOER: Correct. It's in the informant's  
25 home, he visits him, he brings his medical equipment and

1 he does the examination, and the undercover police officer  
2 is there at that time and they were talking.

3 And then the second time is a telephone call  
4 from the undercover, in which the undercover indicates  
5 that she would like him to see her and treat her and he  
6 asks what are your ailments and she states some ailments  
7 and he says, I can't give you oxycodone. She says I got  
8 it down in Florida. And he said in Florida they hand out  
9 those to anyone. I can't give it to you based upon what  
10 you're telling me.

11 THE COURT: What happened with respect to the  
12 informant after he examined the informant that he  
13 prescribed --

14 MR. SCHOER: He wrote a prescription to the  
15 informant that day.

16 MR. BODE: Just so it makes more sense to the  
17 Court, the informant undercover visit was an attempt to  
18 introduce the undercover cop to Dr. Stambler. And the  
19 phone call -- I disagree with Mr. Schoer's description in  
20 terms of the phone call, in terms of how it ended. He did  
21 continue, I think you're right, he did continue to see the  
22 informant after that.

23 MR. SCHOER: I think he did. And he prescribed.  
24 And the way that I understand it, I may be wrong, is that  
25 when the informant first became a patient of his, he was



1 Circuit said a defendant may not introduce his own prior  
2 out-of-court statements because they are hearsay and not  
3 admissible. However, a statement of the declarant's then  
4 existing state of mind, such as motive, intent or plan is  
5 exempted from the hearsay rule, 803 subsection 3.

6 And the Second Circuit says, in this particular  
7 case, therefore, the statements unrecorded would be  
8 admissible because the defendant would show they reflect  
9 his own intent, and in this case they found it did not  
10 reflect that.

11 Similarly, in United States versus L-A-W-A-L,  
12 736 F. 2d 5, Second Circuit 1984, this deals a little bit  
13 with Mr. Bode's argument about self-serving statements by  
14 a defendant shouldn't be admitted, and this was one where  
15 the argument was that certain statements by a defendant  
16 should be on the state of mind. And the trial court ruled  
17 that self-serving statements of the defendant could not be  
18 placed before the jury through the agents.

19 And the Second Circuit rejected that, saying the  
20 trial court's blanket ruling that the defendant's  
21 self-serving statements cannot come in prevented the --  
22 through the agent, prevented the jury from hearing  
23 evidence of something that he had said to the agent that  
24 reflect his intent.

25 And they cite a prior case of theirs; DiMaria,

1 D-I-M-A-R-I-A, where he had dealt with a defendant's  
2 statement regarding cigarettes that were subject to that  
3 prosecution that he said disproved the state of mind that  
4 the government was alleging.

5 And in DiMaria, the Second Circuit held that it  
6 to be admissible in the defendant's favor under 803  
7 subsection 3. And this is now the court summarizing  
8 DiMaria:

9 DiMaria held that while declarations which fall  
10 within the parameters of 803 subsection 3 are  
11 categorically admissible, even if they are self-serving  
12 and made under circumstances which undermine their  
13 trustworthiness, the truth or falsity of such declaration  
14 is for the jury to determine and their self-serving nature  
15 goes only to their weight.

16 And then it cautioned that only the Court ruled  
17 that they didn't exhibit the state of mind related to  
18 something in the past could be properly excluded.

19 And the final case, is a Seventh Circuit case  
20 that dealt with almost the situation, it dealt with a  
21 recording between the defendant and informant, although  
22 there were other recordings of that same informant coming  
23 in. But this particular recording, the defendant argued,  
24 were exculpatory because it reflected a favorable state of  
25 mind for the defendant. And the Seventh Circuit



1 ultimately upheld the trial court's ruling excluding it,  
2 but did so in the following way; it disagreed with the  
3 ruling, but it found them not to be an abuse of  
4 discretion.

5 It said the following with respect to that  
6 recording. We think the February 11 -- United States  
7 versus Giles, G-I-L-E-S, 246 F. 3d 966, Seventh Circuit  
8 2001, and this is now a quote from the case:

9 "We think the February 11 tape should have been  
10 admitted, especially in this case where the defendant was  
11 going to and did testify. The government's argument that  
12 the tape was a product of the defendant's reflection and  
13 attempt to cover his tracks in case he got caught should  
14 have been made to the jury, not the judge.

15 "On a close evidentiary call like this, we think  
16 it's best to err on the side of inclusion rather than  
17 exclusion if an error at all is to be made."

18 I think that's the situation that we have here.  
19 The defendant obviously -- the government's theory of the  
20 case in terms of the intent which relates to the patients  
21 that they are selecting is that his intent to provide  
22 OxyContin without any legitimate medical purpose and the  
23 defendant wants to show that his state of mind in the same  
24 time period as it is reflected to prescribing OxyContin,  
25 is to take affirmative measures to prevent the use by

1 examining the person and tracking them, or refusing  
2 treatment in the case of the undercover.

3 And I believe that that state of mind, that it  
4 does go to the state of mind. The government has two  
5 arguments in response to that. One is it's different  
6 people, and they're not alleging that he engaged in  
7 criminal behavior as to the informant or the undercover.

8 However, I still believe that even though it's  
9 different patients, that it is probative of the --  
10 potentially probative, it's believed, and the jury -- as  
11 the Second Circuit said, it gets to the jury to decide  
12 whether it demonstrates a lack of intent with respect to  
13 the people the government has selected to not make any  
14 inquiry as to whether they really needed it or not. It's  
15 in the same time frame, it deals with the same drug, and  
16 how he handled those other situations, it's probative of  
17 his overall state of mind.

18 So -- and then in terms of 403 issues, the  
19 government, I don't -- to the extent the government's  
20 argument is the reason he treated these people differently  
21 or the undercover, is he knew at the time the government  
22 was watching him. And the jury can certainly understand  
23 that's true and they're not going to be confused by it.

24 I could give them an instruction when Mr. Schoer  
25 seeks to put the recording in, that the government is not

1 charging that he illegally prescribed medications to the  
2 undercover, offered the issue of the defendant's state of  
3 mind, perhaps some instruction, if the government wanted  
4 me to do that.

5 So I have examined it under 403 as well, and I  
6 don't believe the jurors are going to be confused because  
7 they're hearing evidence of individuals that are not  
8 subject of the government's theory as to which patients  
9 were illegally prescribed medication, especially when it  
10 deals with an informant and an undercover working for law  
11 enforcement.

12 I do want to make clear that I don't want this  
13 ruling to -- and this is why I said what I did to  
14 Mr. Schoer -- to be interpreted that my view would be --  
15 my ruling would be the same if we started having -- if the  
16 defense tried to parade the patients coming in to try to  
17 show the lack of intent with respect to the patients the  
18 government has selected. But I'll deal with that  
19 situation if Mr. Schoer seeks to do that.

20 But I think this ruling is limited at this point  
21 to the informant and the undercover in terms of these two  
22 particular recordings. I'll deal with any other  
23 situations as they arise.

24 Okay. I don't have any other issues. I know  
25 there's back and forth about the jury questions. I'm

1 still going through them. You'll get a copy on Monday of  
2 my proposed questions and you can object or comment at  
3 that point, unless there's something you want to highlight  
4 in particular, I don't plan on going through question by  
5 question.

6 MR. BODE: No, your Honor.

7 MR. SCHOER: No, your Honor.

8 MR. BODE: I gave over to the defense -- I'll  
9 hand up to the Court -- a list of proposed, it includes  
10 both witnesses and names that we expect to come up during  
11 the trial so we can see IF the jurors know any of these  
12 people. Mr. Schoer and I spoke about this.

13 Just in terms of a couple of those people on the  
14 list, your Honor, it indicates -- and the reason we're  
15 filing this under seal and the reason why, is the fourth  
16 and fifth names, Eva and Ellen on the list, those are the  
17 two women I mentioned that the defendant Stambler was  
18 romantically interested in. We don't believe there's  
19 anything criminal that those two women did. I've spoken  
20 to Mr. Schoer and the defense doesn't have any objection;  
21 we're just going to call them by their first names. But  
22 we should see them to know them, obviously. And any  
23 medical record to come in, we'd like to have it come in  
24 under seal so the public can't go through the record.

25 THE COURT: You said during the jury selection,





1 have to weigh public access to the information, I have  
2 concerns about that. To the extent there's unrelated  
3 medical information that doesn't deal with the subject  
4 matter of the testimony in open court, in terms of the  
5 reason that they be prescribed for what their ailment was,  
6 that's going to come out in open court.

7 For the medical record that talks about the  
8 ailment they have, it's unfortunate that it has to come  
9 out, but it's going to come out in testimony. So I don't  
10 understand why we'd be sealing the documents.

11 If there's some unrelated ailment or information  
12 in the document, you wouldn't seal the whole document, you  
13 would redact that information out.

14 MR. BODE: My concern, your Honor, isn't so  
15 much -- sealing now in the Internet age is why we care  
16 more about these things, I guess. Because what I don't  
17 want is that 30 years from now, people are able to go  
18 online -- and I'll give you an example. Nancy Cook has a  
19 daughter, the daughter's name, I don't want people, she's  
20 looking for a job 30 years from now, people will be able  
21 to go online and find her birth records, a number of  
22 records regarding her birth. The circumstances of her  
23 birth.

24 THE COURT: I'll have to look into it. I'll be  
25 curious, even if you haven't done any of these cases, I'd

1 be surprised if there were cases where, along with medical  
2 fraud or prescription drugs, that the trial exhibits that  
3 the jury is going to view were shielded from the public by  
4 some sealing order. I'd be surprised at that.

5 MR. BODE: In your Honor's example, your Honor,  
6 I know has done some recent cases where people are killed.  
7 I think the autopsy photos, photos of people when they're  
8 at the crime scene, the body, I know those aren't open to  
9 the public.

10 THE COURT: We did seal them in the two MS-13  
11 trials, there was not a single exhibit placed under  
12 seal --

13 MR. BODE: I guess we're trusting the newspapers  
14 that they are not going to publish that.

15 THE COURT: No, but they -- I take that back.  
16 Obviously I have some concerns about this from the public  
17 standpoint.

18 MR. BODE: I'll see if I can find any statutes  
19 or anything that deal with it.

20 THE COURT: Or if you can say -- if another  
21 judge in this district has done that, I'd be curious to  
22 see whether they explained what their legal reasoning was  
23 for that.

24 I don't fault you for raising it. I understand  
25 the concern. And I agree with the concern. But I'm just



1 not sure that there's a legal mechanism for doing that.

2 I think, this may not be what the government  
3 wants to hear, but I think to the extent the government is  
4 concerned about that for particular witnesses, that  
5 information is going to have to be redacted out, that you  
6 can't seal the whole document because if witnesses are  
7 testifying about it, and the jury is seeing it, the strong  
8 argument is going to be made that any reporter or member  
9 of the public who wants to see it should be able to. But  
10 I'm going to look into it.

11 MR. BODE: Okay. Thank you, your Honor.

12 A couple of other things while we're here. One,  
13 I had a conversation with Mr. Schoer last week because I  
14 was thinking that we might need a motion in limine and he  
15 assured me we don't. I want to put it on the record.

16 There's two ways a doctor could give someone a  
17 controlled substance; they could prescribe it or they  
18 could dispense it directly. And on November 21, 2011,  
19 when everything kind of breaks down and the law  
20 enforcement comes swooping in, Chris Adams gives 20 pills  
21 to Anthony Rinaldi that day in a cigarette -- and the  
22 defendant -- but I talked to Mr. Schoer and he indicated  
23 he's not going that the defendant Stambler was dispensing  
24 pills to Rinaldi that day.

25 So I wanted to put that on the record because if

1       that was the defense, you'd have to make a motion in  
2       limine as to that defense, your Honor.

3               THE COURT:   Okay.

4               MR. SCHOER:   I assured Mr. Bode that the  
5       defendant did not dispense, that he gave a -- that he  
6       provided prescription -- with a proper prescription under  
7       the law.

8               MR. BODE:   And that's fine.   With that, I did  
9       decided not to do that, I just wanted to put that on the  
10      record.

11              THE COURT:   Okay.

12              MR. BODE:   Just a couple of more things.   So  
13      your Honor is aware, in terms of scheduling, Mr. Schoer  
14      his and I have been very agreeable in terms of I think  
15      stipulations.   We should have at least two stipulations,  
16      so we can avoid calling a few witnesses.

17              And just to remind the Court, because I don't  
18      want the Court to be surprised, we're going to start on  
19      Monday.   On Thursday I have to be in the circuit and then  
20      next Tuesday again I have to be in the circuit again.   I  
21      have two appellate arguments on three different briefs.

22              THE COURT:   We're going to lose a whole day?

23              MR. BODE:   I'm going to ask your Honor to have  
24      us lose the whole day because I don't have a trial  
25      partner.   Usually, as your Honor knows, in my office

1       there's two attorneys, if not three. So there's just me  
2       on this one. I can't have someone here getting witnesses  
3       ready and getting things ready while I'm at the circuit.  
4       So I'd ask that we take off those two days.

5               Even with that, I think we're going to be able  
6       to get this trial done in two weeks, if not a day longer  
7       into the following week. It's not going to be that long.

8               THE COURT: In terms of the jury panel, I was  
9       going to say three weeks to play it safe.

10              MR. BODE: Yes.

11              THE COURT: I think we are hoping to have a  
12       hundred jurors, sometimes we lose more people once you get  
13       beyond two weeks. But I'd rather say three and lose some  
14       more people rather than have people upset if it goes over  
15       two weeks.

16              MR. SCHOER: You're not going to work on Friday.

17              THE COURT: We're not working on Friday.

18              MR. SCHOER: So the first week we're talking  
19       three days and the next week we're talking three days.  
20       It's possible we might go to three weeks.

21              THE COURT: Okay.

22              MR. BODE: Just for the record, Mr. Schoer had  
23       asked me to accommodate, your Honor, his defendant's  
24       doctor, Dr. Weingarten, on Monday the 7th.

25              MR. SCHOER: But again, if it's going to be a



1 blindness is sufficient, so in terms of willfulness of the  
2 defendant, a willful mens rea to break the law is enough.  
3 As long as the defense is opening on that, there's no  
4 issue.

5 MR. SCHÖER: I won't open on that, but I think  
6 we're going to have arguments as we go along to willful  
7 blindness, conscious avoidance.

8 THE COURT: I certainly will have plenty of time  
9 to debate that, as long as you're not going to use the  
10 word willfulness in your opening, we're fine.

11 MR. SCHOER: I won't. If Mr. Bode's finished.

12 MR. BODE: I am.

13 MR. SCHÖER: I have just one issue, Mr. Bode and  
14 I talked about it before your Honor came out. We had --  
15 if your Honor remembers, many months ago you signed a  
16 subpoena for me, an ex parte subpoena for the New York  
17 State Department of Health with respect to the patient  
18 monitoring program that existed and Dr. Stambler's use of  
19 the patient monitoring program.

20 And I received a spreadsheet from them with --  
21 in the column that related to the individual patient who  
22 Dr. Stambler may have been inquiring about, had just  
23 codes. And I had e-mails back and forth with counsel for  
24 the Department of Health as to whether or not they could  
25 identify the individuals themselves who he had inquired

1 about, and I was told that those are algorithms and they  
2 couldn't do it.

3 And I provided Mr. Bode the e-mails back and  
4 forth, just so that he could understand what I tried to do  
5 and what was going on.

6 In the government's exhibits, they have three  
7 exhibits relating to the five patients who they're  
8 focusing on. And while -- they were able to get from the  
9 Department of Health the same sort of spreadsheet, but  
10 with names of those five individual.

11 So I asked Mr. Bode, when he provided that to  
12 me, to attempt to use his good offices to find out why he  
13 could get it and I couldn't. And today he indicated to me  
14 what he's learned is that you have to ask for the patient  
15 names, and not based upon the doctor who's requesting it.

16 So I'm going to again provide Mr. Bode, as  
17 quickly as I can, about 10 or 11 names of people that we  
18 believe relate to the chart that I have. And he's  
19 indicated to me that he will --

20 MR. BODE: It's easier if I -- so the difference  
21 between what Mr. Schoer requested and what I requested is  
22 I requested the same thing that he requested, but I added  
23 "including but not limited to" and I put in five names.  
24 And apparently if you search by name you can find things.  
25 For the five people, Dr. Stambler had computer checks as

1 to three of them, two of them he did not.

2 So I indicated to Mr. Schoer that obviously  
3 we're in a very last minute stage, but if he gives me  
4 those names I can get them turned around and back out to  
5 them within a couple of hours probably. And the witnesses  
6 come in to testify from BNE, Bureau of Narcotics  
7 Enforcement, full arguments can be made -- so I can get  
8 them together.

9 As long as it's a limited number, if I wanted  
10 200 names, I couldn't do it. But if it's a smaller batch,  
11 I'm sure that I can get them together.

12 MR. SCHOER: I'm not raising this to force  
13 Mr. Bode to do anything that he's uncomfortable with  
14 doing. And I'm not raising it to bind him to any policies  
15 that he hasn't spoken to. But I'm raising it so that  
16 your Honor is aware that if he can't do what he's  
17 reporting to help me with, then I'm going to have to ask  
18 for a subpoena and we may get into some sort of issue.

19 THE COURT: It sounds to me, since you're only  
20 requesting 10 or so names, it sounds like Mr. Bode is  
21 going to get it done. If he doesn't, then bring it to my  
22 attention and we'll figure out what subpoenas need to be  
23 issued.

24 I appreciate that you're obviously working well  
25 together, as I expect it to make the trial run efficiently

